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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 SCOTT R. CAFFALL,

10 Plaintiff,

11 v.

12 NANCY A. BERRYHILL, Acting  
13 Commissioner of Social Security,

14 Defendant.

CASE NO. C17-5051-MAT

ORDER RE: SOCIAL SECURITY  
DISABILITY APPEAL

15 Plaintiff Scott R. Caffall proceeds through counsel in his appeal of a final decision of the  
16 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied  
17 Plaintiff's applications for Supplemental Security Income (SSI) and Disability Insurance Benefits  
18 (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's  
19 decision, the administrative record (AR), and all memoranda of record, this matter is REVERSED  
20 and REMANDED for a finding of disability.

21 **FACTS AND PROCEDURAL HISTORY**

22 Plaintiff was born on XXXX, 1958.<sup>1</sup> He has a high school diploma, and has worked as a  
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<sup>1</sup> Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 dish washer, prep cook, fish freezer, forklift operator, and weeder. (AR 58, 340, 418.)

2 Plaintiff protectively applied for SSI and DIB in March 2010. (AR 102-03, 308-15.) Those  
3 applications were denied initially and upon reconsideration, and Plaintiff timely requested a  
4 hearing. (AR 144-48, 150-57.)

5 ALJ Joanne Dantonio held a hearing, but Plaintiff failed to appear and the ALJ  
6 subsequently dismissed his request for a hearing. (AR 135-36.) Plaintiff timely appealed. The  
7 Appeals Council granted Plaintiff's request for review, finding that because the hearing notices  
8 were sent to the incorrect address, he had good cause for his failure to appear. (AR 138.) The  
9 Appeals Council remanded the matter to the ALJ to allow Plaintiff another opportunity for a  
10 hearing. (AR 138-39.)

11 The ALJ held a hearing on December 17, 2014, taking testimony from Plaintiff and a  
12 vocational expert. (AR 53-99.) On June 23, 2015, the ALJ issued a decision finding Plaintiff not  
13 disabled. (AR 30-42.) The Appeals Council denied Plaintiff's request for review on November  
14 21, 2016 (AR 1-10), making the ALJ's decision the final decision of the Commissioner. Plaintiff  
15 appealed this final decision of the Commissioner to this Court.

### 16 **JURISDICTION**

17 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

### 18 **DISCUSSION**

19 The Commissioner follows a five-step sequential evaluation process for determining  
20 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must  
21 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had worked  
22 since his amended alleged onset date, but that the work did not rise to the level of substantial  
23 gainful activity. (AR 32.) At step two, it must be determined whether a claimant suffers from a

1 severe impairment. The ALJ found severe Plaintiff's methamphetamine abuse (in current  
2 remission), cannabis abuse (in reported current remission), alcohol abuse (in uncertain remission),  
3 reading disorder, mathematics disorder, written expression disorder, and borderline intellectual  
4 functioning. (AR 32-34.) Step three asks whether a claimant's impairments meet or equal a listed  
5 impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria of a  
6 listed impairment. (AR 34-36.)

7 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess  
8 residual functional capacity (RFC) and determine at step four whether the claimant has  
9 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of  
10 performing medium work, with the following additional limitations: he cannot climb ladders,  
11 ropes, or scaffolds, and can only occasionally climb ramps. He can occasionally stoop, kneel,  
12 crouch, crawl, and balance. He must avoid concentrated exposure to pulmonary irritants and  
13 vibrations. He is limited to simple, routine tasks that do not require reading, writing, or doing  
14 math. He can work with less than occasional changes in work tasks. (AR 37.) With that  
15 assessment, the ALJ found Plaintiff able to perform past relevant work as an industrial truck  
16 operator. (AR 41.)

17 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to  
18 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an  
19 adjustment to work that exists in significant levels in the national economy. Because the ALJ  
20 found Plaintiff capable of performing past relevant work, the ALJ did not proceed to step five.  
21 (AR 41-42.)

22 This Court's review of the ALJ's decision is limited to whether the decision is in  
23 accordance with the law and the findings supported by substantial evidence in the record as a

1 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more  
2 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable  
3 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
4 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's  
5 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.  
6 2002).

7 The parties agree that the ALJ's decision contains error, but disagree to some degree as to  
8 the appropriate remedy. Plaintiff requests a remand for a finding of disability, or further  
9 proceedings in the alternative, with certain stipulations; the Commissioner requests a remand for  
10 further proceedings on more limited grounds. Dkt. 13, 17. Because, as explained *infra*, the Court  
11 finds error at step three, this error is dispositive and the remainder of the parties' disputes need not  
12 be addressed.

#### 13 Listing 12.05C

14 At step three, the ALJ considers whether one or more of a claimant's impairments meet or  
15 medically equal an impairment listed in Appendix 1 to Subpart P of the regulations. "The listings  
16 define impairments that would prevent an adult, regardless of his age, education, or work  
17 experience, from performing *any* gainful activity, not just 'substantial gainful activity.'" *Sullivan*  
18 *v. Zebley*, 493 U.S. 521, 532 (1990) (emphasis in original; citations omitted).

19 Plaintiff bears the burden of proof at step three. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5  
20 (1987). A mere diagnosis does not suffice to establish disability. *Key v. Heckler*, 754 F.2d 1545,  
21 1549-50 (9th Cir. 1985). An impairment must have the findings shown in the listing, *id.*, and must  
22 meet all of the specified medical criteria, *Sullivan v. Zebley*, 493 U.S. 521, 530 (1990).

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1 To satisfy Listing 12.05C as it existed at the time Plaintiff filed his applications<sup>2</sup>, a claimant  
2 must satisfy the following three requirements:

- 3 (1) Significantly subaverage general intellectual functioning with  
4 deficits in adaptive functioning initially manifested during the  
5 developmental period; i.e., the evidence demonstrates or supports  
6 onset of impairment before age 22;
- 7 (2) A valid verbal, performance, or full scale IQ score of 60 to  
8 70; and
- 9 (3) A physical or other mental impairment imposing an additional and  
10 significant work-related limitation of function.

11 20 C.F.R. pt. 404, subpt. P, app. 1 § 12.05C (2011); *Kennedy v. Colvin*, 738 F.3d 1172, 1175-76  
12 (9th Cir. 2013).

13 The parties agree that the second and third requirements of Listing 12.05C have been  
14 satisfied, as the ALJ herself found. AR 36; Dkt. 17 at 3. The ALJ found that Plaintiff did not meet  
15 Listing 12.05C because there “is still no evidence in the record that [Plaintiff’s] issues manifested  
16 themselves prior to the age of 22.” (AR 36.) Plaintiff argues that his special education history  
17 demonstrates his adaptive functioning deficits during the developmental period. Dkt. 13 at 14.

18 In her brief, the Commissioner argues that Plaintiff’s attendance in special education and  
19 his reading, writing, and mathematics disorders is insufficient to establish deficits in adaptive

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20 <sup>2</sup> In recent revisions to the listings for mental disorders, effective January 17, 2017, the Social  
21 Security Administration removed paragraph C from Listing 12.05. Revised Medical Criteria for Evaluating  
22 Mental Disorders, 81 Fed. Reg. 66138 (Sept. 26, 2016). Revised Listing 12.05B requires: (1) either a full  
23 scale IQ of 70 or below or a full scale IQ of 71-75 with a verbal or performance IQ of 70 or below; (2)  
significant deficits in adaptive functioning “currently manifested” by extreme limitation of one or marked  
limitation of two areas of mental functioning; and (3) evidence about “current intellectual and adaptive  
functioning” and the history of the disorder demonstrates or supports the conclusion it began prior to age  
22. 20 C.F.R. pt. 404, subpt. P, app. 1 § 12.05B (2017). *See also* Listing 12.00H(1).

24 An ALJ should apply the listings in effect at the time of a claimant’s application, and thus this  
25 Court considers whether Plaintiff satisfies the version of Listing 12.05C in effect at the time of his  
application. *See Maines v. Colvin*, 666 Fed. Appx. 607, 608 (9th Cir. Nov. 16, 2016).

1 functioning prior to age 22, because placement in special education does not necessarily reflect the  
2 severity of his impairments, and because he was able to graduate from high school and read recipes  
3 while he was employed in restaurants from age 17 to 34. Dkt. 17 at 4.

4       The Commissioner does not address the many cases holding that special education  
5 sufficiently establishes deficits in adaptive functioning prior to age 22. *See, e.g., Potts v. Colvin*,  
6 637 Fed. Appx. 475, 476 (9th Cir. Mar. 2, 2016) (finding that school records indicating special  
7 education “plainly establish that [claimant’s] intellectual impairments and deficits in adaptive  
8 functioning began before he turned 22”); *Jones v. Colvin*, 149 F.Supp.3d 1251, 1260 (D. Or. Feb.  
9 29, 2016) (“Evidence that demonstrates deficits in adaptive functioning may be circumstantial.  
10 Relevant circumstance evidence includes difficulties with reading and writing, attendance of  
11 special education classes, and dropping out of school.”); *Pedro v. Astrue*, 849 F.Supp.2d 1006,  
12 1012 (D. Or. 2011) (claimant found to satisfy first prong of Listing 12.05C upon a showing that  
13 she attended special education classes through her graduation from high school, and still has  
14 struggles with reading and writing); *Campbell v. Astrue*, 2011 WL 444783, at \*17 (E.D. Cal. Feb.  
15 8, 2011) (claimant found to satisfy first prong of Listing 12.05C upon a showing that he *inter alia*  
16 attended special education classes; struggled with reading, writing, and mathematics; and had a  
17 “low skilled work history”).

18       The Commissioner implies that the lack of IQ testing dating to the developmental period  
19 further undermines the applicability of Listing 12.05C (Dkt. 17 at 4), but this argument is not  
20 persuasive in light of cases holding that such testing is not needed in order to satisfy the first prong  
21 of Listing 12.05C. *See, e.g., Pedro*, 849 F.Supp.2d at 1011-12 (“A showing of early onset for  
22 purposes of Listing 12.05C does not require clinical or IQ tests.”).

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1 Furthermore, although Plaintiff did work in restaurants<sup>3</sup> during the developmental period  
2 and afterward, that work was unskilled. (AR 89, 523.) He performed some semiskilled work as a  
3 forklift operator (AR 89), but the Ninth Circuit and district courts in this circuit have found that  
4 claimants satisfied Listing 12.05C despite an ability to perform semiskilled work. *See Potts*, 637  
5 Fed. Appx. at 476; *Blacktongue v. Berryhill*, 229 F.Supp.3d 1216, 1223 n.8 (W.D. Wash. 2017)  
6 (finding that plaintiff's semiskilled work as a forklift operator did not preclude a finding that he  
7 satisfied the first prong of Listing 12.05C); *McGrew v. Colvin*, 2015 WL 1393291, at \*7 (D. Or.  
8 Mar. 25, 2015) ("Having some work history and possessing average living skills and the ability to  
9 drive does not indicate that a claimant does not have deficits in adaptive functioning."). The Court  
10 therefore rejects the Commissioner's suggestion that Plaintiff's work history shows that he cannot  
11 satisfy the first prong of Listing 12.05C.

12 The undisputed evidence in this case shows that Plaintiff participated in special education  
13 and still has deficits in his ability to read, write, and understand mathematics, and that his work  
14 history involved primarily unskilled jobs. This evidence establishes that Plaintiff satisfies the first  
15 prong of Listing 12.05C, and the parties agree that he satisfies the remaining prongs as well.  
16 Therefore, the ALJ erred in finding at step three that Plaintiff did not meet Listing 12.05C. Further  
17 proceedings would not serve a useful purpose, because the undisputed and unambiguous evidence  
18 shows that Plaintiff meets Listing 12.05C and should have been found disabled at step three.  
19 Accordingly, the appropriate remedy for the ALJ's errors is a remand for a finding of disability.  
20 *See Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015).

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22 <sup>3</sup> Although the Commissioner contends that Plaintiff read recipes as part of his work in restaurants  
23 (Dkt. 17 at 4), Plaintiff's report of making fettuccine according to "special instructions" does not necessarily  
indicate that he read the instructions. (AR 523.) Plaintiff's reference to following a recipe on the back of  
a Rice Krispies box is not likely to be a reference to reading a recipe in a work setting. (*Id.*)

1 **CONCLUSION**

2 For the reasons set forth above, this matter is REVERSED and REMANDED for a finding  
3 of disability under Listing 12.05C.

4 DATED this 2nd day of November, 2017.

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6 Mary Alice Theiler  
7 United States Magistrate Judge  
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